

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 11, 2009

**MARVIN LEE HOLT v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County**  
**Nos. 2005-C-2253, 2006-I-592 Cheryl Blackburn, Judge**

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**No. M2008-00874-CCA-R3-PC - Filed March 30, 2009**

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Petitioner, Marvin Lee Holt, appeals the post-conviction court's denial of his petition for post-conviction relief in which he alleged that his best interest pleas of guilty were not voluntarily and knowingly entered into, and that his trial counsel rendered ineffective assistance. After a thorough review of the record, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which and DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

D. Scott Wilder, Nashville, Tennessee, for the appellant, Marvin Lee Holt.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; and Rob McGuire, Assistant District Attorney General, for the appellee, the State of Tennessee.

**OPINION**

**I. Background**

In case no. 2005-C-2253, Petitioner entered a best interest plea of guilty to theft of property valued between \$1,000 and \$10,000, a Class D felony. In case no. 2006-I-592, Defendant entered a best interest plea of guilty to facilitation of the sale of less than 0.5 grams of cocaine, a Class D felony. As part of the negotiated plea agreement, Petitioner agreed to be sentenced as a Range II, multiple offender, to four years for the theft conviction and six years for the drug conviction. The trial court accepted Petitioner's pleas of guilty and imposed the agreed-upon sentences. Because Petitioner was released on bond in case no. 2005-C-2253 when he committed the offense in case no. 206-I-592, the trial court ordered Petitioner to serve his sentences consecutively for an effective sentence of ten years. Pursuant to the plea agreement, the trial court suspended Petitioner's sentence and placed him on probation for ten years. A probation revocation hearing was held on September

15, 2006, and the trial court revoked Petitioner's probation and ordered him to serve his sentences in confinement.

At the guilty plea submission hearing, the State offered the following factual basis for the plea:

As to [case no.] 2005-C-2253, the State's proof would be on June [4, 2004] Officer Claire (phonetic) of the Metropolitan Police Department was to be on the lookout for a stolen 1993 Nissan with Alabama tags. He observed the vehicle at the Rodeway Inn at Murfreesboro Pike. He saw the defendant near the vehicle. [Petitioner] started to walk off. Officer Claire [sic] confronted him about it. He eventually took [Petitioner] into custody where [a] search incident to arrest yielded the keys to the vehicle. As to [case no.] 2006-I-592, the State's proof would be that on February [15, 2006], officers of the Metropolitan Police Department conducted an undercover narcotics sting to try to purchase street-level drugs from street-level dealers. Officer Beacraft (phonetic) approached [Petitioner] and negotiated that [Petitioner] participate in the sale of cocaine. He provided money to [Petitioner]. [Petitioner] then later returned with cocaine.

At the guilty plea submission hearing, Petitioner stated that he understood that he was proceeding by criminal information in case no. 2006-I-592, and that he waived his right to have the case presented to the grand jury. The trial court explained the length of sentences that would be imposed in each case, his status as a Range II, multiple offender, that the sentences would be served consecutively, and that if he violated the terms of his probation, he would have to serve the remainder of his sentence in confinement. Petitioner said that he understood. The trial court also explained that Petitioner would be permitted to travel to New York, and that the supervision of his probation would be transferred to New York after the successful completion of one year of probation in Davidson County.

The trial court explained to Petitioner the constitutional rights he was waiving by entering a plea of guilty, and Petitioner said that he understood the consequences of his plea. Petitioner acknowledged that he had reviewed the negotiated plea agreement with his trial counsel, that trial counsel explained the ramifications of his plea, that he understood the consequences of entering pleas of guilty to the charged offenses, and that he was satisfied with the assistance provided by trial counsel.

At the conclusion of the guilty plea submission hearing, the trial court accepted Petitioner's pleas of guilty and imposed the agreed upon sentences.

## **II. Post-Conviction Hearing**

At the post-conviction hearing, Petitioner testified that he told his trial counsel that he did not want to accept the State's offer of a probated, effective sentence of ten years. Petitioner said that

trial counsel did not file a motion for discovery and did not discuss the State's evidence with him in either case. Petitioner insisted that the State did not have any evidence linking him to the charged drug and theft offenses, but he only realized this after he was incarcerated. Petitioner said that he was "on crack pretty bad" at the time of the guilty plea submission hearing, and it took a long time for the effects of the drug to wear off.

Petitioner stated that his trial counsel's assistance was ineffective because he did not sufficiently investigate the theft charge involving the vehicle. Petitioner stated that his fingerprints were not found in or on the vehicle, and he had an alibi witness for the time when the vehicle was stolen. Petitioner acknowledged that he had the vehicle's keys on his person when he was apprehended, but he insisted that this was the only evidence connecting him to the vehicle.

As for the drug offense, Petitioner maintained that there was a tape made of the drug buy and the police officer negotiating the purchase did not say that he gave Petitioner money in exchange for drugs. Petitioner said that his trial counsel told him that he listened to the tape and it appeared that the arresting officer stated that Petitioner had sold him drugs. Petitioner said that trial counsel did not have a transcript of the tape made as Petitioner had requested.

Petitioner said that once he was arrested on the drug charge, trial counsel told him that he was "going to do some time." Petitioner said that he wanted to go to Canandaigua, New York, to attend a drug rehabilitation program. Petitioner said that he was "tired of beating [himself] up" and agreed to enter pleas of guilty to both charges if the supervision of his probation was transferred to New York.

Petitioner said that it was his understanding that his probation would be immediately transferred to New York. At the guilty plea submission hearing, however, the State recommended that he serve one year of his probated sentence in Tennessee. Petitioner said that he turned around and asked trial counsel, "what is he talking about staying here a year?" Petitioner stated that trial counsel told him not to worry about it and that trial counsel would "take care of that." Petitioner said that this exchange was not reflected in the transcript of the hearing because the conversation was just between him and trial counsel. Petitioner stated that he would not have entered pleas of guilty if he had known that he could not leave Tennessee immediately. Petitioner explained, "If I was going to stay here a year, I might as well do the time."

On cross-examination, Petitioner acknowledged that the trial court explained the charged offenses to him, and that he told the trial court that he had discussed the plea agreement with trial counsel. Petitioner said that he did not ask the trial court for further clarification about the transfer of the supervision of his probation to New York because trial counsel told Petitioner that he would take care of it.

In response to the post-conviction court's questions, Petitioner acknowledged that there was a notation on the negotiated plea agreement above his signature that he "may travel to N[ew] Y[ork]" and "may pet[ition] to transfer after [one] y[ear]." Petitioner acknowledged that he was not so much

surprised by the requirement that he serve the first year of his probated sentence in Tennessee as “let down.” Petitioner said that he “signed a lot of papers in court without reading them.”

Trial counsel testified that he told Petitioner prior to the execution of the negotiated plea agreement that he would have to serve one year of his probated sentence in Tennessee. Trial counsel said that Petitioner was not happy about that condition of his probation, but he understood. On cross-examination, trial counsel acknowledged that the issue of the manner of service of his probated sentence was not discussed until the day of the guilty plea submission hearing. Trial counsel said that he did not have any discussions with Petitioner at the guilty plea submission hearing that were not reflected in the transcript.

### **III. Standard of Review**

To succeed on a challenge of ineffective assistance of counsel, the petitioner bears the burden of establishing the allegations set forth in the petition by clear and convincing evidence. T.C.A. § 40-30-210(f). However, the trial court’s application of the law to the facts is reviewed de novo, without a presumption of correctness. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to de novo review. Id.; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he or she must establish that counsel’s performance fell below “the range of competence demanded of attorneys in criminal cases.” Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he or she must show that counsel’s ineffective performance actually adversely impacted his defense. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). In reviewing counsel’s performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel’s decisions regarding trial strategies and tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel’s alleged errors should be judged from counsel’s perspective at the point of time they were made in light of all the facts and circumstances at that time. Id. at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the Strickland test before he or she may prevail on a claim of ineffective assistance of counsel. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his or her counsel’s performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. Id. Failure to satisfy either prong will result in the denial of relief. Id. Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069. In cases involving a guilty plea, the petitioner must show prejudice by demonstrating that, but for counsel’s errors, he or she would not have pleaded guilty but would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 42, 59, 106 S. Ct. 366, 370 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

#### **IV. Ineffective Assistance of Counsel**

Petitioner argues that his trial counsel provided ineffective assistance of counsel before and during the guilty plea submission process because he failed to properly investigate the circumstances surrounding his theft and drug charges and failed to advise Petitioner as to any potential defenses to the charges.

As for the theft charge, Petitioner contends that he did not steal the vehicle, and that he was simply holding the vehicle's keys for a woman who had been with Petitioner earlier that evening. Petitioner argues that trial counsel's conduct was deficient because he did not pursue the fact that Petitioner's fingerprints were not found in or on the vehicle and did not call Petitioner's alibi witnesses as requested by Petitioner. Petitioner also contends that trial counsel did not investigate whether there was a surveillance tape at the Kroger Store where the vehicle was stolen. Finally, Petitioner contends that trial counsel did not sufficiently investigate the value of the stolen vehicle and submits that had he done so, Petitioner would not have been charged with felony theft.

As for the drug charge, Petitioner argues that trial counsel's assistance was ineffective because he failed to review the audio tape of the sale of cocaine which would have revealed that the transaction was never completed. Petitioner contends that if trial counsel had required the State to produce the cocaine, he would have been charged with misdemeanor simple possession instead of a felony. Finally, as to both charges, Petitioner argues that trial counsel failed to advise him of potential constitutional challenges that could have been raised incident to his arrests for both charges and the statements he made at the time of his arrests.

Petitioner did not call any witnesses at the post-conviction hearing who might have testified favorably at trial as to the charged offenses. In order to satisfy the prejudice requirement of Strickland based on trial counsel's failure to call one or more witnesses, Petitioner was required to "(1) produce the witness at the post-conviction hearing; (2) show that through reasonable investigation, trial counsel could have located the witness; and (3) elicit both favorable and material testimony from the witness." Denton v. State, 945 S.W.2d 793, 802-03 (Tenn. Crim. App. 1996) (citing Black v. State, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990)). In addition, Petitioner offered no evidence at the post-conviction hearing to support his claims as to the value of the stolen vehicle or the existence of a surveillance tape

Trial counsel testified at the post-conviction hearing that he reviewed the audio tape of the drug transaction, and the tape supported a finding that the transaction had been completed. Moreover, the State was prepared to offer testimony from the investigating officer that Petitioner sold him cocaine in exchange for money had the case proceeded to trial. Petitioner also did not show what circumstances surrounding either arrest would have supported a constitutional challenge or even suggest what that constitutional challenge might be predicated upon.

As the State submits in its brief, the primary focus of Petitioner's dissatisfaction with the entry of his pleas of guilty centered around the condition of his probation which required him to stay

in Tennessee for a period of one year before he could request that the supervision of his probation be transferred to New York. Trial counsel testified at the post-conviction hearing that he discussed this condition with Petitioner prior to the execution of his plea agreement. Trial counsel said that Petitioner was upset over the condition, but accepted the terms of the negotiated plea agreement.

Based on our review, we conclude that the evidence does not preponderate against the post-conviction court's finding that Petitioner failed to show that his trial counsel's conduct was deficient by clear and convincing evidence. Petitioner is not entitled to relief on this issue.

## **V. Entry of Guilty Pleas**

Petitioner argues that his guilty pleas were not voluntarily, knowingly and intelligently entered into because of the ineffective assistance of his counsel and because the trial court failed to properly explain to Petitioner the full ramifications of his pleas.

When an accused enters a plea of guilty, constitutional considerations mandate that the plea be voluntarily, understandingly and knowingly entered. See Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 1713 (1969); State v. Mackey, 553 S.W.2d 337 (Tenn. 1997). By entering a plea, the defendant waives certain constitutional rights including the privilege against self-incrimination, the right to a trial by jury, and the right to confront witnesses. Boykin, 395 U.S. at 243, 89 S. Ct. at 1714. The defendant's waiver of these constitutional rights may not be presumed from a silent record. Id. A plea cannot be voluntary if the accused is "incompetent or otherwise not in control of his mental facilities" at the time the plea is entered. Blankenship v. State, 858 S.W.2d 897, 904-05 (Tenn. 1993) (quoting Brown v. Perini, 718 F.2d 784, 788 (6th Cir. 1983)). The trial court must ascertain if the defendant fully understands the significant consequences of his or her plea. State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1977). The trial court may consider a number of factors including the defendant's relative intelligence, his or her familiarity with criminal proceedings, whether the defendant was represented by competent counsel and had the opportunity to confer with counsel about options, the advice give by counsel and the trial court about the charges against the defendant and the penalty to be imposed, and the defendant's reasons for pleading guilty. Blakenship, 858 S.W.2d at 904.

Petitioner contends that he would not have entered pleas of guilty to the theft and drug charges if his trial counsel has advised him of the State's lack of evidence pertaining to either case. Petitioner stated that it was his belief that the value of the stolen vehicle was less than \$1,000, and that the small amount of cocaine involved in the drug charge would have supported an argument that Petitioner was guilty, at best, of misdemeanor simple possession. As noted above, however, Petitioner failed to present any evidence at the post-conviction hearing that would elevate these contentions above the realm of speculation and failed to show that his trial counsel's assistance was ineffective. Petitioner testified at the guilty plea submission hearing that trial counsel read and explained the terms of the plea agreement, and that Petitioner himself had read the plea agreement. Based upon our review, we conclude that Petitioner is not entitled to relief based on his contention that his trial counsel's assistance rendered his guilty pleas involuntary.

Petitioner also argues that the trial court failed to adequately explain the conditions of his probation to him. Petitioner acknowledges that he has read the transcript of the guilty plea submission hearing. Nonetheless, Petitioner contends that the negotiated plea agreement was changed to preclude him from immediately moving to New York. Petitioner submits that if the trial court had “elaborated in more detail he would have better understood the true nature of the situation” and would not have entered pleas of guilty to the charged offenses. Petitioner also contends that the trial court failed to fully explain the constitutional rights which would be waived upon the entry of pleas of guilty. Petitioner submits that if the trial court had “fully explain[ed], specifically, what he could and could not waive . . . he would have reconsidered his plea.”

As relevant to the conditions of Petitioner’s probation, the following colloquy occurred at the guilty plea submission hearing:

TRIAL COURT: Okay. Now, also I’m apparently going to permit travel permits to New York and may allow you to transfer to the State of New York after you have a one year of successful completion of your probation in Tennessee. So did you understand that?

PETITIONER: Yes, ma’am.

Later, Petitioner initiated the following exchange:

PETITIONER: Excuse me.

TRIAL COURT: Uh-huh.

PETITIONER: On my travel back and forth to New York . . . is there a limitation on that?

TRIAL COURT: Well, you have to get with your – you cannot go until you have talked to your probation officer. And then you have to get a travel permit from me. So, I mean, one of which is I need to know the purpose, where you’re going to stay, how long you’re going to stay. Those sorts of things – you have to have all of that answered before they approach me about it. So, I mean, it’s not just, oh, I can go to New York. You have to have a purpose for going. You have to have a place that you can be contacted at. General, do you want to say something about that?

THE STATE: I would prefer he also sign an extradition waiver before he leave[s] for New York.

THE COURT: Okay. Well, that's part of the probation kind of things. But we do need to do – in other words, you have to agree that if something were to happen in New York and you decided not to come back to Nashville, you've agreed to be brought back to Nashville. It's kind of an extradition form. And, Ms. Turner, if we don't have one, I think we can print one out for you. All right. We'll get one for [Petitioner]. Anything else?

PETITIONER: That's okay.

At the end of the hearing, the trial court again asked Petitioner if he understood the conditions of his probation, told him that he could go to New York after obtaining permission, and that the supervision of his probation may be transferred to New York after the successful completion of his first year of probation. Petitioner responded, "All right." The trial court asked Petitioner if understood what he needed to do in order to move to New York, and Petitioner responded, "Yes."

Petitioner does not elaborate on what further information or instruction he felt should have been provided by the trial court. The conditions of his probation were explained in depth. Petitioner acknowledged at the post-conviction hearing that he never traveled to New York because he was not accepted into the drug rehabilitation program and because he incurred new charges in Tennessee which led to the revocation of his probation. Petitioner acknowledged that the conditions of his probation were written on the plea agreement form at the time he signed the agreement.

At the guilty plea submission hearing, the trial court explained to Petitioner that if he decided to proceed to trial, he would have a right to appeal his convictions and sentences, and that such rights were waived if Petitioner entered pleas of guilty. The trial court complied with Boykin by advising Petitioner that he had a right to a jury trial, that he had a right to confront the witnesses against him and that he had a right not to incriminate himself. Based on our review we conclude that Petitioner has failed to prove that a constitutional right has been violated, and the evidence does not preponderate against the post-conviction court's finding that Petitioner knowingly and voluntarily entered his pleas of guilty. Petitioner is not entitled to relief on this issue.

### CONCLUSION

After a thorough review, we affirm the judgment of the post-conviction court.

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THOMAS T. WOODALL, JUDGE